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NTSB Order No. EA-4372

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of June, 1995

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. CHAPARRAL, INC., FREDERICK T. WACHENDORFER, JR., THOMAS K. BIONDO, and SCOTT DOUGLAS FESLER, Respondents.	Dockets SE-14032 SE-14044 SE-14045 SE-14046

OPINION AND ORDER

The Administrator has appealed from an order Administrative Law Judge William R. Mullins issued on May 8, 1995 that denied his request for an interlocutory appeal from an earlier ruling on a discovery dispute and granted the respondents' motion to dismiss the emergency orders of revocation in this proceeding for the Administrator's failure to comply with the ruling.[1] For the

[1]A copy of the law judge's May 8 order is attached.

reasons discussed below, the Administrator's appeal will be granted and the case will be remanded for a hearing on the merits of the Administrator's charges.[2]

The law judge dismissed the complaints (emergency orders)[3] because the Administrator refused to produce during pre-hearing discovery portions of the Enforcement Investigative Reports (EIR) which contained information that the Administrator asserted was protected from disclosure by either a work product or deliberative process privilege.[4] The law judge determined that the withheld material was not privileged, but was relevant and therefore discoverable. We conclude that, assuming the relevancy of the material, it should have been accorded the protection from discovery it has customarily received in Board proceedings.

Before discussing the basis for our disagreement with the law judge, we think it should be noted that his rejection of the

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[2]The hearing was originally scheduled for May 25. The law judge's dismissal of the revocation orders on a procedural point makes it unlikely that the Board will be able to finally dispose of any further appeal that might be taken by either party after a hearing on the merits by June 20, that is, within 60 days of the Administrator's advice to us that an emergency requiring the immediate revocation of the respondents' certificates existed. Notwithstanding that circumstance, the case should continue to be processed in accordance with the shortened timeframes applicable to an emergency, and we expect the law judge to promptly reschedule and complete the hearing on remand.

[3]The complaints allege numerous violations by respondent Chaparral involving the operation of unairworthy aircraft, use of unqualified pilots, and faulty training and maintenance recordkeeping. The complaints against the individual respondents involve allegations of either maintenance or pilot training record falsifications.

[4]The Administrator withheld some 53 pages of the approximately 1150 pages of documents comprising the EIRs.

Administrator's claim of privilege does not rest on a review of the actual information the Administrator argued he should not be required to release. It rests, rather, essentially on a judgment that nothing in an EIR is eligible for either privilege the Administrator identified. That judgment, moreover, does not reflect a determination that the withheld documents do not qualify, or ordinarily would not be considered, as work product or deliberative process material, or that similar documents have not been so viewed in past cases.[5] It reflects, instead, the law judge's assessment that the goals sought to be furthered by the availability of the subject privileges would not be compromised by denying the Administrator the right to invoke them.[6]

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[5]So far as we are aware, the Board has uniformly upheld the assertion of a privilege against disclosure for information of the kind and character at issue in this case. See, e.g., Administrator v. Bowen, 2 N.T.S.B. 940 (1974) and Administrator v. Hutt, 5 N.T.S.B. 2432 (1987). In fact, the Board in Administrator v. Dilavore, N.T.S.B. Order EA-3879 (1993), p. 6, n. 7., sustained this law judge's recognition of an evidentiary privilege protecting the type of information he ordered disclosed in this proceeding.

[6]For example, the law judge predicts that disclosing an inspector's pre-complaint opinions and recommendations concerning a case will not hinder frank and open discussion with other agency personnel on possible violations of the Federal Aviation Regulations in future cases. While it is certainly true, as the law judge recognizes, that FAA inspectors are "trained professionals who are regularly called upon to testify regarding their investigations (ALJ Order at 4)," the issue before the law judge, in response to the respondents' discovery requests, was not whether disclosure would actually thereafter inhibit inspectors from talking freely with supervisors and legal counsel about a case they had investigated or were still investigating, but whether the Administrator was entitled to assert a privilege designed to foreclose that possibility. If he is, then it makes no difference that the privilege may be unnecessary in the law judge's opinion.

The parts of the EIR (FAA Form 2150-5) that the Administrator sought to protect from disclosure are Block Items 18, 25, 26, 29, 30, and 31 of Section A and the analysis portion of Section D.[7] The law judge concludes that these parts, as well as the rest of the EIRs, are relevant to the cases against the respondents because the EIR is defined by the Administrator as the "means for documenting, assembling, organizing, and

[7]These blocks are described by the Administrator in his brief as follows (Adm. Br. at 10):

> Block 18 - "Regulations Believed Violated." This block identifies the Federal Aviation Regulations which the inspector believes have been violated by Respondent.
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> Block 25 - "Type Action." This block contains the reporting inspector's recommendation of the type of enforcement action.
>
> Block 26 - "Sanction." This block contains the reporting inspector's recommendation of the appropriate sanction.
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> Block 29 - "Regulations Believed Violated." At the Flight Standards Regional Office level, the recommendations made under Block 18 by field office personnel are reviewed by regional division management who either concur with, amend or reject them.
>
> Block 30 - "Recommended Type Action." At the Flight Standards Regional Office level, the recommendation made under Block 25 is reviewed by regional division management who either concur with, amend or reject it.
>
> Block 31 - "Recommended Sanction." At the Flight Standards Regional Office level, the sanction recommended by field office personnel made under Block 26 is reviewed by regional division management who either concur with, amend, or reject it.

Section D, "Facts and Analysis," is described as containing "first, a complete factual statement of the investigation of the alleged violation and, second, the inspector's evaluation and analysis of the results of the investigation and all pertinent safety and enforcement factors." Id. at 11.

presenting all evidence and other pertinent information obtained during an investigation" (FAA Order 2150.3A, Compliance and Enforcement Program, page 109). While all of the information in an EIR may be relevant to the investigation it catalogues, it seems to us that, generally speaking, the only information in an EIR that is relevant to an appeal to the Board is the evidence it references on the charges actually pressed by the Administrator in an ensuing order effecting certificate or civil penalty action. Information bearing on the Administrator's decision to pursue a specific case, whether describing "an inspector's opinions, feelings, and conjectures" about a potential enforcement action (see FAA Order 2150.3A, supra, at p. 115) or simply reflecting the kind of staff recommendations, opinions, and analyses concerning suspected violations, and the proper sanction for them, that routinely find their way into the portions of the EIR the Administrator seeks here to protect, embraces matters of prosecutorial discretion that are not, and should not be allowed by our law judges to be, at issue in a Board proceeding on the merits of charges the Administrator has in fact decided to allege.

Notwithstanding the foregoing, even if we were to assume, arguendo, that the EIR information withheld by the Administrator was somehow relevant to the appeal to the Board as well as to the Administrator's investigation, we would still conclude that the law judge's decision sets forth no valid reason for denying the

material protection from disclosure.[8]

The law judge concludes that the Administrator should forfeit the right to invoke the work product or deliberative process privileges as to the pre-complaint analyses of his inspectors if, as here, the inspectors will be called at the hearing to explain their views as to how the evidence they accumulated demonstrates the violations the Administrator ultimately alleged.[9] We do not agree. In the first place,

[8]The law judge appears to have found persuasive the respondents' argument that since the information the Administrator withheld was relevant, they could not prepare a defense without access to it. The argument, we think, borders on the frivolous. The information withheld from the respondents is not evidence against them, it is what some of the Administrator's personnel *think* about the evidence against them. Respondents obviously do not need such conjectural material in order to respond to the evidence, already disclosed to them, that the Administrator believes establishes the various cited charges. More to the point, apart from the hollowness of the assertion that the respondents' efforts to prepare a defense were hamstrung by the lack of the withheld information, the possible relevancy of the withheld material is not a reason for denying a privilege for which the material qualifies. To the contrary, even in a federal civil trial, where discovery rulings do not have to take prosecutorial imperatives into account, discovery simply is not available for privileged, relevant material. See F.R.A.P. Rule 26(b)(1)("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action....").

[9]The law judge declares that "[r]eview of a document certainly does not impose some privilege upon it, nor does fear of the impact of disclosure on future cases" (Order at 4). Once again, see note 5, supra, the law judge appears to be more interested in determining whether a privilege for certain material should be recognized than in assessing whether a recognized privilege should be applied. We would agree, nevertheless, that it is not, strictly speaking, the actual supervisory review of a document that confers the work product or deliberative process privilege on it. Rather, it is the context in which the review occurs. On the record before us there is no basis for finding that the material the Administrator withheld was not generated within the protected contextual boundaries for

neither the possibility that the inspectors' views on the evidence would be no different before and after the issuance of the complaint, nor the Administrator's decision to allow them to testify about their post-complaint assessments of the evidence, strips their pre-hearing analysis of its privileged character.[10] The Administrator, we think, is free to waive some of the protection the privilege otherwise would have afforded.

In the second place, while it may be helpful for the respondents to know before the hearing how the inspectors' analyze the evidence, the law judge's concern that the respondents would suffer unfair surprise if they were unaware of the analyses until the inspectors took the stand is puzzling.[11] The Administrator had already provided the respondents with copies of the inspectors' post-complaint written analyses of the charges and evidence, and the respondents could have requested a pre-hearing deposition of the inspectors if they nevertheless reasonably believed that the inspectors' testimony at the hearing might raise some matter the respondents had not anticipated.

(..continued)
the privileges he claims for the material.

[10]The Administrator does not, by calling his inspectors, give up the right to object to questions about prosecutorial factors if cross examination of his inspectors ranges beyond their review of the evidence underlying the alleged violations.

[11]The complaints filed by the Administrator are quite detailed (the complaint against respondent Chaparral is twenty-five pages long) and self-explanatory. While the respondents do not argue that the complaints did not give them adequate notice of the charges against them, additional information would have been available on a motion for a more definite statement about them (see Section 821.18 of the Board's Rules of Practice, 49 CFR Part 821).

In view of the foregoing, we conclude that the law judge erred in ordering the Administrator to release information we have previously recognized and treated as privileged. We further conclude that the law judge abused his discretion in ordering the dismissal of the complaints for noncompliance with his orders compelling discovery. Such a sanction would be excessive even in a nonemergency case, where the charges are not represented to implicate an immediate and serious threat to air safety. It was clearly a disproportionately severe and ill-advised sanction in this case because the respondents were not prejudiced by the nondisclosure and the disposition of the matter on a procedural ground will preclude, as previously indicated (see note 2, supra), a timely final decision by the Board on any appeal that may be taken on the merits of the Administrator's emergency orders. In these circumstances we will not attempt to determine what lesser sanction, if any, the law judge should have entered to remedy the Administrator's refusal to obey orders that simply cannot be reconciled with any pertinent Board precedent.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted, and

2. The case is remanded to the law judge for expedited hearing and decision.

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above opinion and order.